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No. 1141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *Petitioner,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.,* *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court entered on April 19, 1965, are not reported and are reproduced in the record (R. 132-140). The opinion of the Court of Appeals for the

Tenth Circuit, entered on December 28, 1966, has not yet been officially reported and is reproduced in Appendix A to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

In the opinion of respondents, the petition raises the following questions:

1. Did a Federal court, before which a petition was pending on December 28, 1966, to enforce an award of the First Division of the Railroad Adjustment Board in favor of railroad employees pursuant to the provisions of Section 3, First (p), of the Railway Labor Act, as amended, have jurisdiction to enter any order other than an order to enforce such award when the defense of the railroad against such award did not raise any question with respect to the Board's failure to comply with the requirements of the statute, the Board's jurisdiction to render the award, or any claim of fraud or corruption by a member of the Board making the award, but only questions with respect to the merits of said award?

2. Did the Court of Appeals err in concluding that petitioner railroad had not raised any question of the validity of the Adjustment Board award which would entitle the carrier to an order to set aside such award pursuant to the provisions of Section 3, First (p), of the Railway Labor Act, as amended?

3. Has petitioner railroad raised a substantial constitutional issue by its claim that the June 20, 1966,

amendment to the Railway Labor Act (Public Law 89-456), limiting the jurisdiction of Federal courts to set aside awards of the National Railroad Adjustment Board, violates the carrier's right to a trial by jury under the Seventh Amendment to the Federal Constitution, particularly since the railroad waived a jury trial of the petition to enforce the Adjustment Board award involved and voluntarily submitted such petition to a determination by the District Court?

STATUTE INVOLVED

The petition involves the provisions of Section 3, First (i) through (r) of the Railway Labor Act, as amended (45 U.S.C., Section 153, First (i) through (r)), and the Seventh Amendment to the Federal Constitution. These provisions are set forth in Appendix "A" hereto.

STATEMENT

The petition asks this Court to review and set aside a judgment of the United States Court of Appeals for the Tenth Circuit directing the District Court to enforce an award of the First Division of the National Railroad Adjustment Board.

The employee claims which were the subject of the award (No. 19389) were based upon the action of The Denver and Rio Grande Western Railroad Company (D&RGW), in requiring effective August 5, 1952, trainmen on east-bound freight trains terminating at the carrier's North Yard in Denver, Colorado, to herd road engines from inbound trains to the tie-up and service track in said yard (R. 63-64). Prior to that date, road engines on freight trains arriving at the Denver terminal were moved from the inbound track to the

tie-up track for inspection and servicing prior to another trip by road engineers with the herding duties being performed by switchtenders (R. 183, 184, 191, 192, 197, 198). Effective that date, the D&RGW abolished the jobs of switchtenders at the yard and directed that the herding work be performed by the trainmen of the arriving freight trains (R. 63, 64).

The practice in the handling of trains arriving at the North Yard by the road train crews in accordance with the carrier's instructions was that the train would be brought in from the north on one of the yarding tracks, normally Nos. 1 or 2 track, and would proceed on that track until the rear of the train cleared the main line when it would be halted. The head brakeman would then cut the engine from the train and herd the engine onto the tie-up or servicing track. The engine reached the tie-up or service track by moving forward south over cross-over switches to a track to the west of yard tracks Nos. 1 or 2 across Pecos Street as far as the overpass of the Valley Highway. It then backed up and moved onto the tie-up or service track on the west side of the yard (R. 184-187, 193-195, 197-201, 205).

The herding operation required the head brakeman to turn the angle cocks on the train and engine, to proceed ahead of the engine on foot to properly line up seven switches on the cross-overs between the yarding track and the track to the west thereof to which it was necessary for the engine to proceed in order to back onto the tie-up or service track, to flag the crossing at Pecos Street across which it was necessary for the engine to move forward in order to position itself to back onto the tie-up or service track, to again flag the crossing at Pecos Street when the engine began to

back up toward the tie-up or service track, to line up five switches across which the engine was required to move to reach the tie-up or service track, and to accompany the engine until it came to rest on such service track. The engine proceeded entirely on signals from the head brakeman. The head brakeman could then proceed to the yard office to sign off duty (R. 184-187, 193-195, 197-201, 205).

When the train came to a halt on the yard track at the North Yard and the engine was cut, the conductor and rear brakeman were normally in the caboose at the rear of the train. They secured the train and then proceeded to walk to the head of the train. Upon arriving at the head of the train, they would assist in the herding work that remained to be done. Under the rules of the D&RGW, it was the responsibility of the conductor to see that the work was properly done and that the engine was properly put away on the tie-up or service track. The conductor would then proceed with the two brakemen to the yard office and sign off the crew on the train register. This could not be done until the engine was properly placed on the tie-up or service track by reason of Federal regulatory requirements (R. 184, 187, 193-195, 197-201, 205).

The trains arriving at North Yard do not arrive on a set schedule, but arrive at any hour during a 24-hour period (R. 201). The road crews have been on trips away from home on an average of between 20 and 48 hours (R. 187). The road trainmen who have operated trains into North Yard and performed duties in connection with the herding of engines estimate that this work required from 15 minutes to an hour and a half after the engine is cut from the train, depending upon the presence of other rail traffic in the yard to inter-

fere with or delay the herding operation (R. 186, 194, 202, 206).

Since it had long been established that the D&RGW could not require train crews to perform this work in the Denver terminal (R. 65-76) and the carrier had agreed by paying claims of a full day's pay (R. 77-80) for previous violations, the Brotherhood of Railroad Trainmen (BRT) opposed the carrier's action in requiring the trainmen to perform this extra work. The BRT asserted that the herding was outside the scope of work that could properly be assigned such employees under the collective bargaining agreements governing the rates of pay, rules, and working conditions of those employees.[1] The train crews involved (head brakemen, rear brakemen, conductor) then filed claims for a day's pay for each of the days they were required to perform the work involved (R. 64). The claim for a day's pay was based on the provisions of the agreements governing their work[2] providing that employees are entitled to a day's pay for any work performed during eight or *less* hours and the established interpretation and application of such provision in the settling of claims on the property of the D&RGW, including specifically claims of the identical type here involved (R. 77-80).

The claims were processed on the property of the carrier in the usual manner up to and including an

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[1] There are involved two collective bargaining agreements—one governing the work and pay of brakemen and a separate agreement governing the work and pay of conductors (R. 61). The conductors' agreement had been taken over by BRT when it succeeded the Order of Railway Conductors as the duly designated representative under the Railway Labor Act of conductors (R. 62).

[2] Rule 6(a) of the Trainmen's Agreement and Rule 16(a) of the Conductors' Agreement. (See page 804 of Adjustment Board Award.)

appeal to the carrier's Director of Personnel, the chief operating officer of the carrier designated to handle such disputes, in accordance with the requirements of Section 3, First (i), of the Railway Labor Act. On October 24, 1952, the Director denied the claims (R. 65). On December 22, 1952, he again denied the claims in response to a request for reconsideration of the prior ruling (R. 65).

The BRT and the carrier's Director of Personnel agreed that the dispute arising out of the claims would be submitted for determination to the National Railroad Adjustment Board. The claims were so submitted to the First Division of the Board (R. 65).

On January 20, 1960, the First Division of the Adjustment Board issued Award No. 19389, which sustained the claims of the D&RGW employees here involved. This decision was made by Referee John F. Sembower after a deadlock between the carrier members and the employee members of the Adjustment Board (R. 81, 129). The employee members of the Board filed a separate supporting opinion. The carrier members of the Adjustment Board filed a dissenting opinion.[3] The decision of the Neutral Referee and

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[3] Award No. 19389 is reported in Volume 142 of the Printed Reports of the First Division of the National Railroad Adjustment Board, page 858 et seq. Copies thereof were attached to the petition below and were furnished for the convenience of the Court of Appeals but were not reproduced in the printed record because there was included not only the actual decision of the Neutral Referee but the entire lengthy presentation of both the employees and the carrier to the Board (R. 9). The supporting opinion of the employee representatives appears at pages 915-923 of the Award and the dissenting opinion of the carrier representatives appears at pages 908-915.

the supporting and dissenting opinions are attached hereto as Appendix "B".

The Board found that the D&RGW did not have the right under the collective bargaining agreements to require the employees involved to perform the work of herding engines at the North Denver Yard. The Board found that the prior practice of the D&RGW in its Denver terminal with respect to the herding of engines under which other employees were used for the duties involved, and prior decisions of the Board itself and of a Presidential Emergency Board involving the same contract issue, including decisions dealing with the Denver terminal of the D&RGW, created a well-established interpretation and application of the collective bargaining agreements by which the D&RGW did not have the right to require the employees involved to perform the herding work (page 908 of the Award).

The principal claim of the D&RGW before the National Railroad Adjustment Board and subsequently before the Federal courts was that the award was precluded by a decision of Special Board of Adjustment No. 12 set up by agreement between the BRT and the carrier on the property to hear and entertain claims then arising out of the carrier's prior action in 1949 in attempting to require trainmen to herd engines at North Denver Yard (R. 134-136).[4] Referee Jackson, sitting on such Board, had rejected the specific claims before him on the ground that the carrier was authorized to require the work in question under the

[4] See statement of carrier's position at pages 891-903 of the Award and Appendix "B" hereto.

switching rule of the collective bargaining agreement (R. 89-91).

The BRT and the affected employees filed suit in the United States District Court at Denver, Colorado, on January 15, 1962, to enforce Award No. 19389 (R. 1-8). The District Court affirmed the Adjustment Board's interpretation and application of the collective bargaining agreements (R. 137-138, 140). It rejected the contention of the D&RGW that the award, which involved separate claims arising out of the subsequent 1952 carrier action, was precluded by the decision of Special Board of Adjustment No. 12 (R. 137).[5]

However, the District Court reduced the amount of the award to the nominal sum of $1.00 for each employee involved for each day on which the employee had a claim on the ground that under contract principles of damages the employees were entitled only to nominal damages since there was no contractual basis for the award of a full day's pay for each day of the carrier's violation (R. 137-140). The District Court thus disagreed with the BRT and the Adjustment Board's interpretation and application of the collective bargaining agreements involved.

The BRT and the individual employees involved appealed that portion of the judgment of the District

[5] It was clear that the decision of Special Board of Adjustment No. 12 was erroneous since it was based upon the conclusion that the D&RGW could require the work involved under its switching rule while the Director of Labor Relations of the carrier at the trial of the petition to enforce Award No. 19389 categorically stated that he did not regard the herding operation at the North Denver Yard involved as a switching operation (R. 274).

Court reducing the amount of the award (R. 144).[6] The D&RGW cross-appealed the District Court's

[6] The appeal of the BRT, et al., raised the following points:

(a) The cross-appeal of the D&RGW should be dismissed since the United States Supreme Court has recently ruled that the determinations of the National Railroad Adjustment Board with respect to the interpretation and application of collective bargaining agreements is not open to judicial review.

(b) The District Court is not empowered to interpret the meaning and application of the bargaining agreements to the measure of compensation for work performed contrary to determinations of the National Railroad Adjustment Board.

(c) The District Court erred in finding that the collective bargaining agreements did not provide a full day's pay for the extra work which the carrier illegally required employees to perform since there is a clear and unambiguous rule in the agreements defining a day's pay as work of eight hours or less.

(d) The District Court erred in disregarding the established practice of the parties in the interpretation and application of the collective bargaining agreements with respect to the payment of employees for the work here involved upon the grounds that the prior practice involved claims of a small amount and were not voluntary because of strike threats.

(i) The amount of prior settlements of similar claims is irrelevant.

(ii) The issue of duress in the past practice of the parties was not properly before the District Court as it was not raised by the pleadings, the pretrial order, nor by the carrier's proposed findings to the District Court.

(e) The finding of duress is not supported by the evidence which clearly shows that there were no strike threats to induce the prior practice upon which appellants rely.

(f) The District Court erred in finding that the employees had already been paid for the extra work performed. It could do so only by applying Rule 29(c) of the collective bargaining agreement to that work. The record shows that Rule 29(c) was never intended to be applied to such situations and had not in fact at any time been so applied by the carrier.

(g) The District Court erred in finding that it would be inequitable to require the carrier to pay the full amount of the award because such conclusion is not supported by the record and is not a proper legal basis for reducing the amount of the award.

affirmance of the Adjustment Board's interpretation and application of the collective bargaining agreement as not authorizing the carrier to require train crews to perform the work involved (R. 145).

The appeals were argued before the Court of Appeals on May 20, 1966. At the time of the District Court's decision of April 19, 1965, on the petition to enforce Award No. 19389, Section 3, First (m), of the Railway Labor Act provided that awards of the National Railroad Adjustment Board "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award". Section 3, First (p), of the statute authorized a suit to enforce an award for non-compliance by the carrier involved, made the findings and order of the Adjustment Board prima facie evidence of the facts therein stated and authorized Federal courts "to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board". Under such statutory provisions, this Court held that Adjustment Board awards are final and binding on employees. *Union Pacific R. Co.* v. *Price,* 360 U.S. 601, 614. This Court also held that such awards are final and binding upon carriers with respect to the interpretation and application of a collective bargaining agreement and are not open to judicial review even though a money award is involved. *Gunther* v. *San Diego & Arizona Eastern Ry. Co.,* 382 U.S. 257 (1965). The Court's statement on this point read as follows: (page 312)

> "Section 3 First (m) provides that Adjustment Board awards 'shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.' The award of the Board in this case, based on the central finding that petitioner was wrongfully removed from serv-

ice is twofold, consisting both of an order of reinstatement and the money award for lost earnings. Thus there arises the question of whether the District Court may open up the Board's finding on the merits that the railroad wrongfully removed petitioner from his job merely because one part of the Board's order contained a money award. We hold it cannot.

* * * * *

"The Railway Labor Act as construed in the foregoing and other opinions of this Court does not allow a federal district court to review an Adjustment Board's determination on the merits of a grievance merely because a part of the Board's award, growing from the Board's determination on the merits, is a money award. The basic grievance here—that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health—has been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court."

The District Court had set aside the monetary portion of Adjustment Board Award No. 19389 only by an interpretation and application of the collective bargaining agreement as is clearly shown not only by the decision of the District Court (R. 137-140), but by the statements of the D&RGW in the petition (Pet. 2, 7).

On June 20, 1966, while the litigation was pending before the Court of Appeals, Public Law 89-456 amending Section 3 of the Railway Labor Act became effective. The amended Section 3, First (m), provided that awards of the Adjustment Board "shall be final and binding upon both parties to the dispute". Section 3, First (p), of the statute as amended authorized suits

to enforce orders of the Adjustment Board and limited the jurisdiction of the Federal courts with respect to such suits as follows:

> "The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

Thereafter, the Court of Appeals entertained supplemental briefs from both the BRT, et al., and the D&RGW regarding the effect of these amendments to the Railway Labor Act upon the litigation before it (Appendix A to Pet.).

On December 28, 1966, the Court of Appeals issued its opinion remanding the case to the District Court with instructions to enforce the award (Appendix A to Pet.). This decision was based upon the grounds that the 1966 amendments to the Railway Labor Act eliminated the jurisdiction of the Federal courts to review and set aside awards of the National Railroad Adjustment Board in whole or in part except upon the limited grounds set forth in the amendments. The Court of Appeals also considered and rejected the arguments of the D&RGW that its claims that Award No. 19389 was barred by the decision of Special Board of Adjustment No. 12 raised a defense with respect to the jurisdiction of the Adjustment Board within the

meaning of the amendment to Section 3 First (p), of the Railway Labor Act. The Court of Appeals also considered and rejected the carrier's claim that the amendments to the Railway Labor Act incorporated in Public Law 89-456 violated any carrier right to trial by jury under the Seventh Amendment to the Federal Constitution by reason of the fact that a carrier was denied a trial de novo with respect to an award.

It is this decision of the Court of Appeals to which the petition is directed.

REASONS FOR DENYING THE PETITION

I.

THE PETITION RAISES NO SUBSTANTIAL ISSUE OF FEDERAL LAW WARRANTING REVIEW BY THIS COURT

A. The petition raises no substantial issue with respect to the interpretation and application of a Federal statute

The primary issue in the Court of Appeals decision is the application of Public Law 89-456 to the litigation pending before the Court. This issue does not raise a substantial Federal question warranting review by this Court because (a) while the particular case is important to both petitioner and respondents the impact of the decision is limited since it can apply only to a small number, if any, of suits to enforce Adjustment Board awards pending before Courts of Appeals on June 20, 1966, which have not yet been decided,[7] and (b) the Court of Appeals does not enunciate any new principle of Federal law since the decisions of this Court make clear that where an intervening statutory change, particularly one affecting the jurisdiction of

[7] Public Law 89-456 would obviously apply to any suit involving an Adjustment Board award filed after June 20, 1966, and would also clearly apply to any suit pending in a District Court on that date.

Federal courts, takes place while litigation is pending before Federal courts the amended law is applicable. *United States* v. *The Schooner Peggy,* 1 Cranch (U.S.) 103 (1801); *Carpenter* v. *Wabash Ry. Co.,* 309 U.S. 23 (1940); *Vandenbark* v. *Owens-Illinois Glass Company,* 311 U.S. 538 (1941); *Bruner* v. *United States,* 343 U.S. 112 (1952); *United States* v. *Alabama,* 362 U.S. 602 (1960); *Linkletter* v. *Walker,* 381 U.S. 618 (1965). This is true whether the statutory amendment restricts jurisdiction, as in the *Bruner* case, or confers jurisdiction, as in the *Alabama* case, cited above. In the *Alabama* case, this Court referred to the rule as embracing "familiar principles".

The petitioner argues that the decision is contrary to established principles of statutory construction. It attempts to avoid the many decisions of this Court cited above by stating that the Court of Appeals relied upon the decision in *Bruner* v. *United States,* 343 U.S. 112, and by then arguing that the *Bruner* case is not applicable because it involved a situation in which the intervening statute completely eliminated Federal jurisdiction over the cause of action, while Public Law 89-456 retained Federal court jurisdiction over suits to enforce Adjustment Board awards but simply restricted the subject matter of review in such suits (Pet. 20, 21). However, it is submitted that Public Law 89-456 did restrict the jurisdiction of Federal courts over Adjustment Board awards and is clearly a statutory enactment within the scope of the *Bruner* decision. Prior to the enactment of Public Law 89-456, the Railway Labor Act gave Federal courts jurisdiction to entertain in a trial de novo the merits of an Adjustment Board monetary award and to affirm or set aside the amount of such award. *Gunther* v. *San Diego & Arizona Eastern Ry. Co.,* 382

U.S. 257 (1965). Public Law 89-456 eliminated the jurisdiction of Federal courts to review the merits of an Adjustment Board award in a trial de novo on any issue. The Federal courts are now left with jurisdiction only to consider (1) whether the Board has failed to conform, or confine itself, to matters within the scope of its jurisdiction, (2) whether there has been fraud or corruption, and (3) whether the Board has failed to comply with the requirements of the statute. Thus, the statute has, as in the *Bruner* case, provided no jurisdiction in a Federal court to exercise the type of judicial review of Adjustment Board awards for which the petition contends.

The petition also tacitly recognizes the correctness of the application of Public Law 89-456 to the litigation pending before the Court of Appeals by advancing as its principal reason for the granting of a writ of certiorari the contention that the decision of the Court of Appeals is contrary to that law (Pet. 9-17). The petition argues that the Adjustment Board had jurisdiction to grant the monetary claims of the employees only upon the basis of provisions in the collective bargaining agreement between the BRT and the D&RGW; that the District Court agreed with the carrier's contention that the monetary award in Award No. 19389 was not warranted by any provision of the collective bargaining agreement; that therefore the Adjustment Board had exceeded its jurisdiction in making the monetary award so that the D&RGW objections to such award were properly the subject of judicial review under the provisions of Section 3, First (*p*), of the Railway Labor Act, as amended by Public Law 89-456. On its face, this argument constitutes a strained effort to promote a dispute with respect to the inter-

pretation and application of provisions of the collective bargaining agreement into a jurisdictional issue.

That the true nature of the dispute is simply one concerning the interpretation and application of collective bargaining agreements is clearly shown by the record. The monetary claims were based upon provisions of the collective bargaining agreements covering the trainmen and conductors of the D&RGW, which provide that "8 hours or less . . . shall constitute a day's work" (R. 61, 62), and the contention of the employees that when the D&RGW improperly required the employees to perform the work of herding engines without compensation, it was then required to compensate them for such work in accordance with the cited contract provisions. This position was buttressed by numerous settlements made by the D&RGW over a period of years applying these contract provisions to improper work assignments, including the herding of engines at other terminals (R. 73-80). These claims, which the Adjustment Board sustained, showed that the case before the District Court was thus clearly a dispute not over the jurisdiction of the Board but over its interpretation and application of the collective bargaining agreement.

The petition argues that the Adjustment Board decision was not based on the agreements becaues it did not identify provisions of such agreements as the basis for the monetary award. There was no need for the Board to do any more in this respect than to sustain the claims as presented, which were based upon and did cite the agreements (R. 64-65). The only argument of the D&RGW to the Board with respect to the amount of the award was a mere mention in passing that the matter was governed by switching Rule 15

which the Board rejected. The carrier's case to the Adjustment Board was predicated primarily on a contention that it should not be found in violation of the collective bargaining agreements in ordering the employees to perform the herding work because this issue had been previously settled by Special Board of Adjustment No. 12 in 1949. This is clearly shown by the dissent of the carrier members to the Board's decision attached hereto as Appendix "B", and it was to this contention along with the established practice on the property and other Board decisions on the subject to which the Neutral Referee primarily addressed his opinion.

The fact that the claims did not involve any question of Board jurisdiction is further clearly shown by (a) the stipulation of facts before the District Court showing that the claims were submitted for determination to the Adjustment Board by agreement of the BRT and the D&RGW (R. 65); (b) the D&RGW answer to the enforcement petition in the District Court which failed to assert a contention that the Adjustment Board had no jurisdiction of the employee claims or had exceeded the jurisdiction in rendering the award (R. 9-13); (c) the D&RGW pretrial statement of contested issues of fact and law in the District Court which raised no claim or issue that the Adjustment Board had exceeded its jurisdiction (R. 59); (d) the District Court pretrial order which set forth the issues before it on the enforcement petition which contained no issue with respect to the Adjustment Board jurisdiction (R. 95-97); and (e) finally the decision of the District Court reducing the amount of the award which was based solely upon a disagreement with the position of

the BRT as to the interpretation and application of the collective bargaining agreement and not upon any finding that the Adjustment Board did not have jurisdiction to render the award that it did (R. 136-140). If the position of the D&RGW is correct, then every dispute concerning the interpretation and application of a collective bargaining agreement becomes a jurisdictional issue and the merits of Adjustment Board decisions become subject to judicial review directly contrary to the limitations of Public Law 89-456.[8]

B. The petition does not raise any substantial constitutional issue

The petition also asserts that the writ should be granted because Public Law 89-456 denies to carriers their right to a jury trial under the Seventh Amendment to the Federal Constitution (Pet. 21-25). Assuming *arguendo* that there could be a common law right to jury trial in a statutory suit to enforce an Adjustment Board award, thus giving rise to a right under the Seventh Amendment, no such right could be asserted by the D&RGW in the present case because it waived such right and voluntarily submitted the case to the District Court sitting without a jury (R. 132). The D&RGW is thus in no position to contend that it has been denied any constitutional right and it cannot assert such a right on behalf of carriers generally as

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[8] Significantly, the petition in substance abandons the principal contention which it advanced to both the Adjustment Board and the court, i.e. the claim that its right to require the work involved had been decided by Special Board of Adjustment No. 12 thus precluding the Adjustment Board from deciding otherwise under the rule of *res judicata*. No mention is made in the petition of this contention as a reason for the granting of a writ of certiorari.

it seeks to do in its petition. *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961).

Even if the D&RGW were in a position to make the argument, it is wholly without merit. The decision of the Court of Appeals points out that Public Law 89-456 does not eliminate a jury trial on any issue concerning Adjustment Board awards which may be submitted to a Federal court, but rather limits such issues as may be entertained by the court either sitting with or without a jury (Pet. 30, 31). The D&RGW argument must, therefore, come down to a contention that Congress had no constitutional right to limit judicial review of Adjustment Board awards. It is respectfully submitted that such a contention has no merit in the light of this Court's decisions in *Union Pacific R. Co.* v. *Price*, 360 U.S. 601; *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548; *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257; *Transportation-Communication Employees Union* v. *Union Pacific R. Co.*, — U.S. —, 17 L. Ed. 2d 264, decided December 5, 1966. These decisions emphasize the final and binding character of Adjustment Board awards. In addition, the decision in this *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Burlington & Quincy R. Co.*, 225 F. Supp. 11, aff'd 331 F. 2d 1020, *cert. den.* 377 U.S. 918, case sustained the validity of the establishment under Public Law 88-108 of an arbitration board to render final and binding decisions subject to limited court review of Section 6 Railway Labor Act contract disputes between employees and carriers.

II.

THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH ANY OTHER COURT OF APPEALS DECISION OR WITH DECISIONS OF THIS COURT

The petition argues that the decision of the Court of Appeals conflicts with a decision of the Fourth Circuit in *Hanson* v. *Chesapeake and Ohio Ry. Co.*, 367 F. 2d 134, and with a decision of the Fifth Circuit in *Hodges and Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R. Co.*, 363 F. 2d 534 (Pet. 18-19). In each of these cases, the Court of Appeals involved, citing *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257, reversed a judgment of a district court granting summary judgment to a railroad in a suit to enforce an Adjustment Board award and remanded the case to the district court for the determination of the amount due the employees.[9]

Both of these decisions were rendered after the passage of Public Law 89-456 on June 20, 1966. The petition argues that the decisions are in conflict with the decision of the 10th Circuit here involved because the Fourth and Fifth Circuits did not apply the 1966 amendments to Section 3 of the Railway Labor Act embodied in Public Law 89-456 in the two decisions.

However, neither the Fourth Circuit in the *Hanson* case nor the Fifth Circuit in the *Hodges* case gave any consideration to the effect of Public Law 89-456 on the

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[9] In the *Hodges* case, the BRT and the Atlantic Coast Line Railway Company reached an agreement on the disposition of the claim involved following the Fifth Circuit decision and such agreement was incorporated in a judgment of the District Court, entered on March 17, 1967. The *Hanson* case is still pending.

appeals before them and did not make any findings with respect to this point. The decisions thus clearly indicate that the issue of the impact of Public Law 89-456 upon pending litigation to enforce Adjustment Board awards was not raised before either the Fourth Circuit or the Fifth Circuit in the cited cases. This is confirmed by a review of the records of those cases. Counsel for the BRT has confirmed the accuracy of this fact through counsel for the employees in each case. Nor is there even any indication that either the Fourth Circuit or the Fifth Circuit was aware of the passage of Public Law 89-456 when the cited decisions were rendered.

Under these circumstances, the *Hanson* and *Hodges* decisions cannot properly be said to conflict with the decision of the Court of Appeals in the present case.

CONCLUSION

Upon the basis of the foregoing considerations, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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